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IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1935.

No. 34

Borax Consolidated, Limited, a corporation, and Pacific Coast Borax Company, a corporation,

Petitioners,

vs.

The City of Los Angeles, a municipal corporation,

Respondent.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Now come Borax Consolidated, Limited, and Pacific Coast Borax Company, the above named petitioners, and present this their petition for a rehearing of the above entitled cause; and, in support thereof, respectfully show:

Grounds of Petition.

The grounds of this petition are these:

1. The status of this case necessitates a decision of whether, as a matter of state law, the neap line is the boundary of Mormon Island even though the Federal grant *ex proprio vigore* extends only to mean high tide line.

2. The theory upon which *Knight v. United Land Association*, 142 U. S. 161, was differentiated in the instant opinion is untenable because based upon a misapprehension of its controlling fact.

I.

The paragraph at the bottom of page 11 of the instant opinion is somewhat obscure, particularly the last sentence:

> "In California, the Acts of 1911 and 1917, upon which the City of Los Angeles bases its claim, grant the 'tidelands and submerged lands' situated 'below the line of mean high tide of the Pacific Ocean.' Petitioners urge that 'ordinary high water mark' has been defined by the state court as referring to the line of the neap tides. We find it unnecessary to review the cases cited or to attempt to determine whether they record a final judgment as to the construction of the state statute, which, of course, is a question for the state courts."

It refers to the argument of petitioners that the neap line has become a rule of property as well as one of statutory construction in the state of California. But the statute involved in petitioners' argument and to which this language of the court obviously refers is the *California Civil Code*, particularly sections 670 and 830. (See O. B., pp. 103-105.) Manifestly this language could not refer to the granting acts of 1911 and 1917, which specify "the line of mean high tide" as the limit of the grant, and are, of course, not susceptible of a neap-line interpretation.

This case has been sent back to the District Court for retrial. The ultimate question is "Who owns the disputed area?" It cannot turn upon a theoretical question

of what would be the effect of the Federal grant standing alone. Had it been held that the patent extends to the line of the neap tides, that would of course be determinative; but it having been here found that the Federal grant extends only to mean high tide line, the question still remains of the extent to which, if at all, the state of California has chosen "to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity," concerning which matter "it is not for others to raise objections" (quoting *Barney v. Keokuk*, 94 U. S. 324, 339; see, also, *Packer v. Bird*, 137 U. S. 661, 669-70). This is but an application of the principle recognized at bar, where it is said: "Rights and interests in the tideland, which is subject to the sovereignty of the state, are matters of local law" (p. 8).

If California has determined the neap line to be the upper limit of the state's claim to tideland, the *Barney* and *Packer* cases, *supra*, become operative; hence it becomes necessary for this tribunal or the trial court to determine what the state law is in this respect. This court, in *Hardin v. Jordan*, 140 U. S. 371, 384, assumed as a proper burden the determination of the state law under similar circumstances. This was likewise done in *Shively v. Bowlby*, 152 U. S. 1, 53-57, and in *Port of Seattle v. Oregon & Washington R. R. Co.*, 255 U. S. 56, 64. But the instant opinion, which will become the law of the case, directs the determination of petitioners' property rights according to the mean high tide line and, because of the declination of this court to pass upon the question, precludes (or, at least, lays basis for a claim that it precludes) the trial judge from determining the litigants' property rights in California according to the law of California. This difficulty is emphasized by the last sentence

of the above quoted paragraph, and particularly the statement that the construction of the state statute (meaning the Code) "is a question for the state courts." There is grave danger that the interpretation of this decision upon a retrial will leave the defendants in a position which is less advantageous than they would have occupied in the state court, and that their property rights will be determined by a different standard.

The recognized rule is that Federal courts are bound by state rulings concerning rules of property (see O. B., p. 105), and it is equally well settled that any Federal court which has jurisdiction over property disputes involving an interpretation of state law must determine for itself whether there has been a final and authoritative exposition of the state rule and, if not, what the proper interpretation of the same is. (*United Fuel Gas Co. v. R. R. Com.*, 278 U. S. 300, 307; *Risty v. Chicago etc. R. Co.*, 270 U. S. 378, 387.) The cited cases show this function to pertain to this court as well as lower tribunals.

We respectfully submit that in thus eliminating from this court's decision a determination of whether the neap rule is controlling in California and in directing the trial court to determine petitioners' rights according to the mean high tide line, this court has inadvertently and unintentionally narrowed the issues in a manner which, if not corrected upon rehearing, will substantially prejudice the rights of the petitioners.

II.

Referring to the second ground, we suggest that vital error lies in the thought expressed in this sentence (Opinion, p. 7): "But that conclusion was not sufficient to meet the plaintiffs' claim under the state grant, unless it could be held that title to the land had not passed to the State." This sentence is the crux of the discussion and differentiation of the *Knight* case. It immediately follows the recognition of the ruling upholding the power of the Secretary of Interior to vacate the first survey of his own motion and order a new one. In effect it says that the court had to find a Mexican grant of tideland in order to sustain the second survey. But does it not overlook the exact factual situation there under consideration? We refer to the circumstance that the decree upon which that survey proceeded was worded as follows:

> "The land of which confirmation is made is a tract situated within the county of San Francisco, and embracing so much of the extreme upper portion of the peninsula *above ordinary high-water mark* (as the same existed at the date of the conquest of the country, namely, the seventh of July, A. D. 1846), on which the city of San Francisco is situated, as will contain an area of four square leagues—said tract being bounded on the north and east *by the bay of San Francisco;* on the west by the Pacific ocean; and on the south by a due east and west line drawn so as to include the area aforesaid." (142 U. S., pp. 169, 190; italics by Mr. Justice Field.)

The court, at page 170, said:

> "The measure of the city's title to the four square leagues of land is to be found in the decree of confirmation and the act of Congress just recited."

Nothing in the prevailing opinion or the concurrence of Mr. Justice Field or in the preceding Land Department decisions (2 L. D. 346; 5 L. D. 483) tends to indicate that Mexico had attempted to make any grant of tideland in connection with the San Francisco pueblo. Any language of *San Francisco v. LeRoy,* 138 U. S. 656, which seems to so indicate is plainly *dictum* or at best *arguendo.* In the nature of things the decree of confirmation was conclusive evidence to the contrary,—"ordinary high water mark" having been carefully inserted (see *Knight* case, p. 207) to avoid misunderstanding in this respect.

The fact that this court did not consider itself to be dealing with a grant of tideland in the *Knight* case is emphasized by its reference to *Tripp v. Spring* (pp. 182, 210) and its holding that the proper method of determining boundary is to cross from one defined headland, projection or other fixed point to another without reference to intervening or intersecting tide or other waters (see, especially, p. 207). In view of this recognized rule of surveying, it was held error to receive evidence that the *locus in quo* was tideland in fact (pp. 182-3); the Land Department survey being conclusive to the contrary (pp. 176-7, 182).

It was not because of any Mexican attempt to grant tideland or any decree confirming *such* a grant that the state* or its grantee was foreclosed from proving tideland

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*See, People v. San Francisco, 75 Cal. 394.

in fact; it was because the Land Department had jurisdiction to survey the grant as confirmed, i. e., according to "ordinary high water mark," and because its determination of boundary was deemed conclusive regardless of the presence or absence of error; this view followed from the concept that the Department is a special statutory tribunal to which had been delegated a function which, though quasi-judicial in nature, could be lawfully removed from judicial competence (see prevailing and dissenting opinions in *Crowell v. Benson,* 285 U. S. at pp. 57, 88-9).

The real question here is the same as that in the *Knight* case. We quote page 5 of the instant opinion: "The question before us is * * * as to its authority to make a survey, as a basis for a patent, which would preclude the State or its grantee from showing in an appropriate judicial proceeding *that the survey was inaccurate* * * *." (Italics ours.) Such an attempt of the state or its grantee is the exact thing which was condemned by the *Knight* decision.

Von Leicht's duties in the *Knight* case commenced after the confirmation of a title bounded by "ordinary high water mark"; he had a peninsula to survey and ordinary high water mark was his boundary. Norway was concerned with an island which was concededly public land [R. pp. 44, 111, 165-6; see, also, Resp. Br. pp. 5, 93] and whose boundary was "ordinary high water mark." The existence of jurisdiction over the primary subject matter is equally clear in each case,—the survey of the boundary of a parcel of land known and conceded to be subject to patent by the United States.

We submit that it is a mistaken notion that the presence or absence of jurisdiction to make the Mormon Island

survey depended upon the correctness of the Land Department's factual determinations. The Department had jurisdiction to err like any other human tribunal. The instant opinion seems to treat the question as if the Norway survey dealt only with the disputed area, and the fact of a subject matter known and conceded to be upland subject to survey seems to have been overlooked. Specifically we ask the court to reexamine the statement: "Here, the question goes to the existence of the subject upon which the Land Department was competent to act" (p. 6); and that it do so in the light of Mr. Justice Field's severe condemnation (at pp. 204-206, 211-212, of 142 U. S.) of this method of approach,—remembering that the language is that of a distinguished former member of this court whose decisions are largely basic in our public land law.

We also call attention to the fact, according to what we believe to be the true conception, that this question does not present "a controversy as to title" (as suggested at p. 6 of the Opinion), but one of boundary, and is governed by such cases as *Russell v. Maxwell Land Grant Co.*, 158 U. S. 253, 258. Title to tideland in the state of California is conceded; likewise title to Mormon Island in the United States; solution of the question of "where is the boundary" does not involve a transfer of title or disturb or affect existing titles. (See *Russell v. Maxwell Land Grant Co., supra*, at p. 259; *Young v. Blakeman*, 153 Cal. 477, 482; *Muchenberger v. City of Santa Monica*, 206 Cal. 635, 642.)

For the foregoing reasons, it is respectfully urged that this petition for a rehearing be granted and that the decree of the Circuit Court of Appeals be, upon further consideration, reversed and that of the District Court affirmed.

Respectfully submitted,

GURNEY E. NEWLIN,

A. W. ASHBURN,

Counsel for Petitioners.

Certificate of Counsel.

We, Gurney E. Newlin and A. W. Ashburn, counsel for the above named petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

GURNEY E. NEWLIN,

A. W. ASHBURN,

Counsel for Petitioners.